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David P. Aschenbeck

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EXAMINER

KRUER, KEVIN R

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

07/01/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action

Applicant's arguments have been fully considered but are not persuasive.

Applicant's proposed amendments have not been entered because (1) they raise issues that would require further consideration and/or search, (2) they raise the issue of new matter, (3) they present additional claims without canceling a corresponding number of finally rejected claims, and (4) they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal.

With regards to (1), the proposed limitations have not previously been considered. Thus, the amendment would require further search and/or consideration.

With regards to (3), Applicant proposes adding new claim 39 without canceling a corresponding number of pending claims. Said claim would also be drawn to a non-elected invention.

With regards to (4), the proposal raises new matter issues. Furthermore, it is not clear from applicant's arguments that the claimed invention would be distinguished over the prior art. The proposed claim does not exclude particles from being present in parts of the asphalt coating other than the "upper surface portion." Applicant argues the particles of Ingram are evenly distributed throughout the asphalt matrix. In arguendo, applicant's argument is correct, nothing in the claim language excludes particles in all parts of the matrix. Furthermore, the particles in Ingram that are at the "upper surface portion" of the coating could still read on applicant's first and second portions of granules with the additional particles of Ingram being an unclaimed additional component.

With regards to (2), Applicant acknowledges the specification does not contain explicit support for the proposed amendment, but argues the proposed amendment is supported by Figure 3, as originally filed. Applicant argues the Figure illustrates "substantially all" of the first portion of granules are positioned within the "upper surface portion" of the upper asphalt coated portion. "Substantially all" is defined in paragraph 0029 of the specification. However, it is not clear what is meant by "upper surface portion." Furthermore, it is not clear that said limitation is supported by Figure 3. Neither the specification nor the figures gives the skilled artisan any direction on how to determine said limitation. To the contrary, the specification teaches the particles should be pressed into the asphalt coating (0021).

Applicant argues the particles of Ingram do not read on the claimed "prime" granules. The examiner respectfully disagrees. As noted in the rejection, the largest aggregates were understood to read on the claimed "first portion of granules," including the prime granules of claim 38. Applicant argues said particles are not prime granules but "rather a mixture of rock particles and...waste or by product materials, such as ceramic scarp, tile scrap, and furnace slag." Applicant, however, fails to explain why such particles do not read on the claimed "prime" granules. As noted on pages 1 and 2 of the specification, prime granules are those granules that are colored, provide aesthetic benefits or provides a functional purpose. The particles disclosed in Ingram meets all three categories as it is colored and provides the function of weather resistance (col 1, lines 18+). Applicant proposed an alternative definition of "prime" granules as being those coated with a ceramic coating. However, said definition is

counter to the definition in the specification and has not support in the original disclosure.

Applicant has also filed a declaration by Mr. Grubka. Said declaration is not persuasive. With regards to points (1) and (2), said arguments have been addressed above. With regards to (3), a difference in purpose is insufficient to establish patentable subject matter over the prior art. With regards to (4), the granules are not distinguished from the granules of the prior art for the reasons stated above. With regards to (5), said points have been fully addressed in the Advisory Action of 5/13/08 and the Final rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KEVIN R. KRUER whose telephone number is (571)272-1510. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on 571-272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1794

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Kevin R Kruer/
Primary Examiner, Art Unit 1794